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EXAMINER

LE, KHANH H

ART UNIT PAPER NUMBER

3622

DATE MAILED: 09/29/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/827,230

Applicant(s)

HICKFORD ET AL. 

Examiner

Khanh H. Le

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM
THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 04 April 2001.
2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-23 is/are pending in the application.
4a) Of the above claim(s) _____ is/are withdrawn from consideration.
5) ☐ Claim(s) _____ is/are allowed.
6) ☒ Claim(s) 1-23 is/are rejected.
7) ☐ Claim(s) _____ is/are objected to.
8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>5/4/01 and 6/18/01</u> . <u>5/9/01/04</u> | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. This Office Action is responsive to the original Application. Claims 1-23 are pending.

Claim Rejections - 35 USC §101

2. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

3. **Claims 1-22 are rejected under 35 U.S.C. 101 because the claimed inventions are directed to non-statutory subject matter.**

As an initial matter, the United States Constitution under Art. I, §8, cl. 8 gave Congress the power to "[p]romote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries". In carrying out this power, Congress authorized under 35 U.S.C. §101 a grant of a patent to "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition or matter, or any new and useful improvement thereof." Therefore, a fundamental premise is that a patent is a statutorily created vehicle for Congress to confer an exclusive right to the inventors for "inventions" that promote the progress of "science and the useful arts". The phrase "technological arts" has been created and used by the courts to offer another view of the term "useful arts". See *In re Musgrave*, 167 USPQ (BNA) 280 (CCPA 1970). Hence, the first test of whether an invention is eligible for a patent is to determine if the invention is within the "technological arts".

Further, despite the express language of §101, several judicially created exceptions have been established to exclude certain subject matter as being patentable subject matter covered by §101. These exceptions include "laws of nature", "natural

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phenomena", and "abstract ideas". See *Diamond v. Diehr*, 450, U.S. 175, 185, 209 USPQ (BNA) 1, 7 (1981). However, courts have found that even if an invention incorporates abstract ideas, such as mathematical algorithms, the invention may nevertheless be statutory subject matter if the invention as a whole produces a "useful, concrete and tangible result." See *State Street Bank & Trust Co. v. Signature Financial Group, Inc.* 149 F.3d 1368, 1973, 47 USPQ2d (BNA) 1596 (Fed. Cir. 1998).

This "two prong" test was evident when the Court of Customs and Patent Appeals (CCPA) decided an appeal from the Board of Patent Appeals and Interferences (BPAI). See *In re Toma*, 197 USPQ (BNA) 852 (CCPA 1978). In *Toma*, the court held that the recited mathematical algorithm did not render the claim as a whole non-statutory using the Freeman-Walter-Abele test as applied to *Gottschalk v. Benson*, 409 U.S. 63, 175 USPQ (BNA) 673 (1972). Additionally, the court decided separately on the issue of the "technological arts". The court developed a "technological arts" analysis:

The "technological" or "useful" arts inquiry must focus on whether the claimed subject matter...is statutory, not on whether the product of the claimed subject matter...is statutory, not on whether the prior art which the claimed subject matter purports to replace...is statutory, and not on whether the claimed subject matter is presently perceived to be an improvement over the prior art, e.g., whether it "enhances" the operation of a machine. In *re Toma* at 857.

In *Toma*, the claimed invention was a computer program for translating a source human language (e.g., Russian) into a target human language (e.g., English). The court found that the claimed computer implemented process was within the "technological art" because the claimed invention was an operation being performed by a computer within a computer.

The decision in *State Street Bank & Trust Co. v. Signature Financial Group, Inc.* never addressed this prong of the test. In *State Street Bank & Trust Co.*, the court found that the "mathematical exception" using the Freeman-Walter-Abele test has little, if any, application to determining the presence of statutory subject matter but rather, statutory subject matter should be based on whether the operation produces a "useful, concrete and tangible result". See *State Street Bank & Trust Co.* at 1374. Furthermore, the court found

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that there was no "business method exception" since the court decisions that purported to create such exceptions were based on novelty or lack of enablement issues and not on statutory grounds. Therefore, the court held that "[w]hether the patent's claims are too broad to be patentable is not to be judged under § 101, but rather under §§ 102, 103 and 112." See *State Street Bank & Trust Co.* at 1377. Both of these analysis goes towards whether the claimed invention is non-statutory because of the presence of an abstract idea. Indeed, *State Street* abolished the *Freeman-Walter-Abele* test used in *Toma*. However, *State Street* never addressed the second part of the analysis, i.e., the "technological arts" test established in *Toma* because the invention in *State Street* (i.e., a computerized system for determining the year-end income, expense, and capital gain or loss for the portfolio) was already determined to be within the technological arts under the *Toma* test. This dichotomy has been recently acknowledged by the Board of Patent Appeals and Interferences (BPAI) in affirming a § 101 rejection finding the claimed invention to be non-statutory. See *Ex parte Bowman*, 61 USPQ2d (BNA) 1669 (BdPatApp&Int 2001).

Thus the present basis for a 35 USC 101 inquiry is a two-prong test :

- (1) whether the invention is within the technological arts; and
- (2) whether the invention produces a useful, concrete, and tangible result.

As to the second prong of the test, for a claimed invention to be statutory, the claimed invention must produce a useful, concrete, and tangible result. In the present case, the claimed invention produces awards (i.e., repeatable) used to encourage a health-related behavior (i.e., useful and tangible).

However claims 1-22 fail the first prong of the test.

Under this test, for a process claim to pass muster under the "technological arts" prong, the recited process must somehow apply, involve, use, or advance the technological arts. In the present case, claim 1 have no connection to the technological arts. The recited steps of merely enrolling a user into a reward program, collecting and

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evaluating data for compliance does not apply, involve, use, or advance the technological arts since all of the recited steps can be performed in the mind of a person, by use of a pencil and paper, then manually and physically presenting to another person.

As to technological arts recited in the preamble, mere recitation in the preamble (i.e., intended or field of use) or mere implication of employing a machine or article of manufacture to perform some or all of the recited steps does not confer statutory subject matter to an otherwise abstract idea which is without connection to the technological arts unless there is positive recitation in the claim as a whole to breathe life and meaning into the preamble.

In the present case, none of the recited steps, or even in the preamble, are directed to anything in the technological arts as explained above. Looking at the claim as a whole, nothing in the body of the claim recites any structure or functionality to suggest that a computer performs the recited steps.

Although the recited process produces a useful, concrete, and tangible result, since the claimed invention, as a whole, is not within the technological arts as explained above, claims 1-22 are deemed to be directed to non-statutory subject matter.

To overcome this rejection the Examiner recommends that Applicant amend the claims to better clarify which of the steps are being performed within the technological arts, such as incorporating a computer network or electronic network **into the steps (not just the preamble)**; for example: “(a) enrolling a user into a reward program, over a computer network for sale...”. The other claims could be similarly amended to include a computer network.

Claim Rejections - 35 USC § 102

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

5. **Claims 1-4, 9-10, 12-15, 20-21, 23 are rejected under 35 U.S.C. 102(e) as being anticipated by Brown, US 6151586, herein Brown.**

As to claim 1, Brown discloses:

A method for rewarding user behavior, the method comprising:
enrolling a user into a reward program, the reward program encouraging user behavior beneficial to health;

collecting data associated with the user behavior beneficial to health; and
evaluating the collected data to determine whether the collected data satisfies

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a performance target defined by the reward program (see at least abstract, Figs. 1-2, fig. 6A-6B and associated text).

As to claim 2 (dependent on claim 1), Brown discloses dispensing an award to the user if the collected data satisfies the performance target (see at least Fig. 6B and associated text).

As to claim 3 (dependent on claim 1), Brown discloses collecting data further comprises receiving data downloaded from a personal data capture device (see at least Figs 14B, item 322 “measurements”, Fig. 15B, item 418, and associated text).

As to claim 4 (dependent on claim 1), Brown discloses the user behavior beneficial to health pertains to any one of a fitness activity, a medical treatment, and dietary habits (see at least Figs. 6B, “ blood sugar level” and associated text).

As to claim 9 (dependent on claim 1), Brown discloses displaying a plurality of reward programs, each of the plurality of reward programs rewarding user engagement in a particular health-related activity (see at least Figs. 7 and associated text, col. 12 lines 7-14: each script is a reward program);

receiving an indication of a user selection of one of the plurality of reward programs Figs. 7, item 142 and associated text; col. 12 lines 7-14) ; and displaying a list of awards available for the selected reward program (see at least Fig. 5B ,item 130 and associated text).

As to claim 10 (dependent on claim 1), Brown discloses a group of users is enrolled in the reward program (Fig. 7, item 144; Fig. 13 and associated text) and utilizing the reward program to control health-related activities of the group of users.

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Claims 12-15, 20-21 parallel claims 1-4, 9-10 in system format and are rejected similarly.

Claim 23 parallels claim 1 in computer format and are rejected similarly.

Claim Rejections - 35 USC § 103

6a. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6b. **Claims 5, 7, 16 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brown as applied to claim 1 above, and further in view of “THE EFFECTS OF A SIX-MONTH, INCENTIVE-BASED, WORKSITE EXERCISE PROGRAM on ADHERENCE AND WORK CAPACITY (HEALTH PROMOTION)”, DIALOG File 35 Record # 01182386, 1991, herein “SIX-MONTH”.**

As to claims 5 and 16 (dependent on claims 1 and 12, respectively) Brown does not specifically disclose the reward program defines a start date and an end date for the user behavior beneficial to health. However, SIX-MONTH discloses a 6 month health-related incentive program. It would have been obvious to one skilled in

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the art at the time the invention was made to add SIX-MONTH to Brown to allow an incentive program for a definite period.

As to claims 7 and 18 (dependent on claims 5 and 16, respectively), Brown discloses feeding health related data measures from constant monitors such as blood glucose monitors (see at least Figs. 2, 14A, 15A, 23 and associated text) therefore Brown discloses providing constant feedback of behavior information to the user.

7. Claim 6 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brown and SIX-MONTH”, as applied to claim 5 above, and further in view of “School meals make pupils a healthy profit UK: HEALTHY EATING ENCOURAGED AT SCHOOL”, DIALOG(R), File 583:(c) 2002, record # 0667768, 27 Aug 1998, herein “HEALTHY EATING”.

As to claim 6 (dependent on claims 5 and 16, respectively) Brown does not disclose the performance target identifies the amount of points that the user must accumulate by engaging in the behavior beneficial to health between the start date and the end date. However, “HEALTHY EATING” discloses a health related incentive scheme under which sensible eating will result in reward points. It would have been obvious to one skilled in the art at the time of the invention to add HEALTHY EATING’s points system to Brown for a common rewards accounting method.

8. Claims 8 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brown as applied to claim 1 above, and further in view of “HEALTHY EATING”.

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As to claims 8 and 19 (dependent on claims 1 and 12, respectively) Brown does not disclose an initiator of the reward program is a third party benefiting from the user behavior beneficial to health. However HEALTHY EATING implicitly discloses children are enrolled in the programs by their parents or the school who would benefit from better behavior from better diet.

9. Claims 11 and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brown.

As to claims 11 and 22 (dependent on claims 1 and 12, respectively) Brown discloses determining a list of awards that may be of interest to potential participants of the reward program (see at least Fig. 5B, item 130 and associated text; col.2 lines 14-21).

Further, Brown discloses it is known some awards are based on demographic reports (profiles) (see at least col.2 lines 17-21). It would have been obvious to one skilled in the art at the time the invention was made to add such practice to the Brown's main invention because they are known to be effective awards.

Conclusion

10. Prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Brown, US 6101478, discloses Multi-user remote health monitoring system.

Kerr II, US 6612984 B1, discloses the technology for feeding health related data measures from constant monitors such as heart rate monitors over the Internet (see at least abstract, cols 3 and 4, Fig. 3 and associated text) for monitoring compliance with a prescribed medical regimen (col. 6 lines 1-4).

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“EFFECTIVENESS OF A MULTICOMPONENT INTERVENTION FOR MODIFYING THE NUTRITIONAL PRACTICES OF COLLEGE STUDENTS”, DIALOG(R)File 35:(c) 2004, record #1010132, 1987 discloses inspection of daily food selection behavior by the subject students and implicitly discloses feeding to students that behavior.

“What will they think of next?/inventions”, December 4, 2000 , downloaded 8/10/04 from Time.com , discloses “Phone-in check-ups” about SportBrain that monitors fitness data constantly and can send data to the company website for analysis against others and other products such as Angelcare which parent strap to their infants sounding alarms..

“The wireless device” Internet World, v6, n24, p18, Dec 15, 2000, Dialog File 16, Record # 08229485” discloses SportBrain uploading data to a personalized webpage.

“I, Cyborg: The SportBrain device brings body monit...” by Schonfeld, Erick, eCOMPANY Now, v1 n7 p89(1) Dec 2000, DIALOG(R)File 256, Record # 00128240 discloses SportBrain uploading of data to Website.

***“New Gadgets get a workout “, by Mary Huhn, Dec. 21, 2000, downloaded from <http://www.nypost.com/technology/18546.htm>, discloses different wrist blood pressure, heart rate monitors, also SportBrain homepage for analysis ...**

***“The pursuit of Happiness”, The Wall Street Journal, downloaded 02/09/2001 from <http://www.sportbrain.com/About us/ images/ArticleWSJ o.gif> discloses SportBrain.**

*** “Exercise buffs strap on workout latest in technology” By Jon Fortt Mercury News, Posted at 5:39 p.m. PDT Saturday, May 27, 2000, discloses constant**

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monitoring and user feedback of health-related data, loaded into PC's, collected from handheld computers, software that tells if you've reached your training goals or cheating on your diet; a Vivonic **Fitness Planner , using Palm technology**, which synchronizes with a PC for tracking daily /weekly totals; Polar Coach heart rate monitor data which is fed into a PC using the Coach Light Software.

“New Wireless Golf Application Improves Playing Skills; Offers Unprecedented Data for Manufacturers”, PR Newswire, pNA, Nov 27, 2000, Dialog File 16, Record #08090414, discloses technology that maps a golfer's game during play and will automatically upload it to the Internet via personalized Web page for further analysis.

**PERSONAL TRAINERS THAT DON'T LOOK BETTER THAN YOU
NEW ELECTRONIC DEVICES CAN MOTIVATE WHERE WILLPOWER
FAILS Atlanta Constitution (AC) - Tuesday, January 30, 2001, Edition: Home
Section: Features Page: C1,By: M.A.J. McKenna; Staff, DIALOG(R)File 713,
record # 11030010**, discloses **SportBrain**, Vivonic, HealtheTech and other portable fitness monitoring gadgets including the Accusplit, the NutriGuide, the Mio, the Biotrainer, the Digiwalker and more which combine some form of exercise tracker with a food journal, nutrition database or means of calculating calories burned and which connect with the Internet, a home computer or both.

* supplied by Applicants

11. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Khanh H. Le whose telephone number is 703-305-0571. The Examiner works a part-time schedule and can normally be reached on Tuesday-Thursday 9:00-6:00.

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If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's supervisor, Eric Stamber can be reached on 703-305-8469. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9326 for regular communications and 703-872-9327 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1113.

August 23 ,2004

KHL

KHL


JAMES W. MYHRE
PRIMARY EXAMINER

Serial Number 09/827,230
Art Unit 2162

**Requirement for Information Under 37 C.F.R. § 1.105
Attachment to Paper dated 20040823**

1. Applicant and the assignee of this application are required under 37 CFR 1.105 to provide the following information that the examiner has determined is reasonably necessary to the examination of this application.

2. In view of the printed articles as follows relating to the sale and use of SportBrain,

"The wireless device" Internet World, v6, n24, p18, Dec 15, 2000, Dialog File 16, Record # 08229485, which discloses SportBrain uploading data to personalized webpage.

"I, Cyborg: The SportBrain device brings body monit..." by Schonfeld, Erick, eCOMPANY Now, v1 n7 p89(1) Dec 2000, DIALOG(R)File 256, Record # 00128240 disclosing SportBrain uploading of data to Website;

"What will they think of next?/inventions", December 4, 2000 , downloaded 8/10/04 from Time.com disclosing **"Phone-in check-ups", about SportBrain** that monitors constantly and can send data to the company website for analysis against others;

***"New Gadgets get a workout ", by Mary Huhn, Dec. 21, 2000, downloaded from <http://www.nypost.com/technology/18546.htm>**, disclosing SportBrain homepage for analysis;

***"The pursuit of Happiness", The Wall Street Journal, downloadaed 02/09/2001 from <http://www.sportbrain.com/About us/ images/ArticleWSJ o.gif>** disclosing Sportbrain,

a question of public use under 35 U.S.C. 102(b) is raised .

Applicant is hereby requested to submit all evidence regarding the use of the claimed invention.

In response to this requirement, please provide:

1) the dates and the extent to which the claimed invention was put into use by the Applicant and to demonstrate with any relevant documentation, specifically, that the use is experimental and not subject to the 35 USC 102(b) statutory bar for public use more than one year prior to the date of filing of the Application.

2) the citation and a copy of each publication which any of the applicants authored or co-authored and which describe the disclosed subject matter.

3) the names of any products or services that have incorporated the claimed subject matter

3. The fee and certification requirements of 37 C.F.R. § 1.97 are waived for those documents submitted in reply to this requirement. This waiver extends only to those documents within the scope of this requirement under 37 C.F.R. § 1.105 that are included in the applicant's first complete communication responding to this requirement. Any supplemental replies subsequent to the first communication responding to this requirement and any information disclosures beyond the scope of this requirement under 37 C.F.R. § 1.105 are subject to the fee and certification requirements of 37 C.F.R. § 1.97.

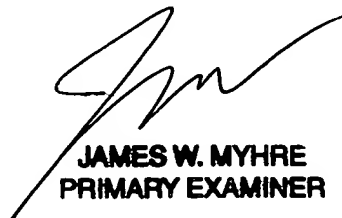
4. In responding to those requirements that require copies of documents, where the document is a bound text or a single article over 50 pages, the requirement may be met by providing copies of those pages that provide the particular subject matter indicated in the requirement, or where such subject matter is not indicated, the subject matter found in applicant's disclosure.

5. The applicant is reminded that the reply to this requirement must be made with candor and good faith under 37 CFR 1.56. Where the applicant does not have or cannot readily obtain an item of required information, a statement that the item is unknown or cannot be readily obtained will be accepted as a complete response to the requirement for that item.

6. This requirement is an attachment of the enclosed Office action. A complete response to the enclosed Office action must include a complete response to this requirement. The time period for reply to this requirement coincides with the time period for reply to the enclosed Office action, which is THREE months.



Khanh H. LE
August 23, 2004


JAMES W. MYHRE
PRIMARY EXAMINER